88-1882

Supreme Court, U.S.
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No. 89-_____

IN THE SUPREME COURT OF THE UNITED STATES
Spring Term, 1989

MANUEL REYES, PETITIONER

v.

STATE OF KANSAS, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF KANSAS

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QUESTION PRESENTED

1. Does the State's failure to directly identify the accused and failure to make some affirmative effort, by circumstantial evidence, to identify the accused as the perpetrator of a crime, violate the due process clause of the Fifth and Fourteenth Amendments and the confrontation clause of the Sixth Amendment to the United States Constitution?

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No. 89-_____

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Spring Term, 1989

MANUEL REYES, PETITIONER

v.

STATE OF KANSAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF KANSAS

OPINION BELOW

The opinion of the Supreme Court of the State of Kansas in this case is unreported and consists of a denial of a petition for review, which is reprinted in the appendix hereto (Appendix A, Infra). The opinion of the Court of Appeals of the State of Kansas was not designated for publication, however, was numbered (No. 61,589) and is reprinted in the appendix hereto (Appendix B, Infra).

JURISDICTION

Petitioner Manuel Reyes was convicted in the District Court of Barton County, Kansas, of two (2) counts of indecent liberties of a child, in violation of Kan. Stat. Ann. 21-3503, on October 9, 1987. (All Kansas Statutes will hereafter be cited as K.S.A.). Petitioner's appeal to the Court of Appeals of the State of Kansas was affirmed on November 18, 1988. A timely petition for review was filed with

the Kansas Supreme Court on December 16, 1988. The Petition for review was denied on January 31, 1989. (reprinted at Appendix A, Infra). This petition for certiorari was mailed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Kansas Statutes Annotated Constitution, Bill of Rights, §10

United States Code Annotated Constitution, Amendment 5

United States Code Annotated Constitution, Amendment 6

United States Code Annotated Constitution, Amendment 14

(Text in Appendix C)

STATEMENT OF THE CASE

The Defendant, Manuel Reyes, was convicted of two counts of indecent liberties of a child, in violation of K.S.A. 21-3503.

The Defendant contends there was no in-court identification of the defendant, nor was evidence presented of an out-of-court identification.

The State's principal witness was Charles Orth, detective sergeant for the Great Bend, Kansas Police Department. Sergeant Orth testified that child victim T.S. identified "trailer 32" as the location at which the rape occurred (R.I, 22). He also testified that T.S. advised him that the perpetrator of this crime was "the man that lived at trailer 32" and that although she didn't know the man by name, he believes she may have given him a brief description of the perpertrator (R.I, 25, 26).

Sergeant Orth also testified that child victim D.B. could not identify the man by name, but identified him as being the man that lived in trailer 32 and also gave a

brief description of "the man" (R.I, 30).

Sergeant Orth never testified about the brief descriptions given to him by T.S. and D.B. and he never attempted to identify the defendant as the perpetrator of the crime, as the man who lived in trailer 32 or as Manuel Reyes, the man accused of this crime.

Jane Meschberger, a social worker for the Kansas Department of Social Rehabilitation Services interviewed D.B. (R.I, 96) and T.S. (R.I, 105). During the interviews, D.B. and T.S. were asked to choose from 8 anatomical correct drawings of male figures to represent their assailant. D.B. picked a drawing of a black adult male to depict the person who assulted her (R.I, 100). T.S. picked a drawing of a white adult male to depict the person who assulted her (R.I, 109). Ms. Meschberger testified there were no hispanic

drawings (R.I, 110), and that the choices of white or black adult male and white or black teenage male would have been appropriate choices (R.I, 113, 114). Again, no identification of the accused as the perpetrator of the crime was attempted.

State's witness, Larry Morris, a serologist and hair and fiber analyst, testified that out of 51 hair samples, only one displays characteristics of the defendant and that the other 50 either do not display those characteristics or were not examined (R.I, 182), however, notwithstanding his opinion that the hair displays some mongoloid characteristics, he could not tell the jury that the hair was the defendant's (R.I, 183).

State's witness, Eileen Burnau, a Crimalist 3 with the Kansas Bureau of Investigation, testified that the same hair did not display monoloid characteristics

(R.I, 202).

State's witness Kelly Robbins, a forensic examiner in the field of serology, testified that the semen examined in this case could have come from the defendant, however, it could also come from 58.6 percent of the male caucasion population or from 65.2 percent of the hispanic male population (R.I, 221,222).

Although the police found a rental agreement in the name of Manuel Reyes in trailer 32 (R.I, 69) and prescription bottles in the name of Manuel Reyes in trailer 32 (R.I, 71), the state did not call the landlord, doctor or pharmacist to identify the defendant.

Notwithstanding the state being well aware that identification of the accused was questioned and a problem (R.I, 4, 5, 6, 7, 8, and 9), the state never attempted to identify the defendant as the perpetrator of the crime.

The state did not move to re-open its case to present identification testimony after defendant's motion for judgment of acquittal and never profered any evidence relative to the identification of the defendant.

The petitioner was found guilty of two counts of indecent liberties of a child and sentenced to 2 concurrent terms of 5 to 15 years imprisonment. Following his conviction, Mr. Reyes took an appeal to the Court of Appeals and sought review from the Kansas Supreme Court. Specifically, petitioner argued that the trial court, in failing to grant defendant's motion for acquittal, based upon the State's failure to identify the defendant, was violative of the defendant's right to confrontation and due process under the 5th, 6th and 14th Amendments to the United States Constitution.

In its opinion, the Court of Appeals of the State of Kansas improperly found that the defendant was sufficiently identified for double jeopardy to attach, and that there was no possibility the defendant is not the Manuel Reyes who occupied the trailer located in Lot 32 and is the man who attacked the victims. The court did not address petitioner's allegation regarding the violation of his constitutional rights and affirmed the conviction. Petitioner's timely petition for review by the Kansas Supreme Court was summarily denied.

REASONS FOR GRANTING THE WRIT

1. To allow a case to go to a jury or to allow a conviction to stand, without requiring the prosecution to directly identify the accused, or by

affirmatively identifying the accused by circumstantial evidence, violates the confrontation clause of the Sixth Amendment and the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

The confrontation clause of the Sixth Amendment to the United States Constitution provides in pertinent part that "the accused shall enjoy the right... to be confronted with the witnesses against him...". U.S. Constitution Amendment VI. This court's decisions construing the confrontation clause describe the defendant's right to confront his accuser as twofold. First, the defendant has a right to cross-examine the witness. The rational for this right is to test the truth of the testimony given.

Davis v. Alaska, 415 U.S. 308, 316, 39 L.Ed. 2d 347, 84 S.Ct. 1105 (1974). Second, the defendant has a right to a face-to-face meeting with his accuser at trial. Mattox v. United States, 156 U.S. 237, 242-243, 34 L.Ed. 409, 15 S.Ct. 337 (1895). The purpose of the face-to-face confrontation is to allow the fact-finder the opportunity to observe the demeanor of the witness when making his or her accusation in front of the one person who knows if he or she is being truthful. Barber v. Page, 390 U.S. 719, 725, 20 L.Ed.2d 255, 88 S.Ct. 1318 (1968). See also Kirby v. United States, 174 U.S. 47, 55, 43 L.Ed. 890, 19 S. Ct. 574 (1899) (defendant entitled to confront witness "upon whom he can look while being tried").

While this Court has held that the primary purpose secured by the confrontation

clause is the opportunity for cross-examination Deleware v. Van Arsdall, 475 U.S., 89 L.Ed. 2nd 674, 683, 106 S.Ct. 1431 (1986), it nevertheless has continued to define the clause as encompassing the right to a face-to-face confrontation. See, e.g., Ohio v. Roberts, 448 U.S. 56, 63, 65 L.Ed. 2d 597, 100 S. Ct. 2531 (1980); California v. Green, 399 U.S. 149, 157-158, 26 L.Ed. 2d 489, 90 S.Ct. 1930 (1970).

The law is well established that the state must prove their case beyond a reasonable doubt, including the identity of the defendant. In 23 C.J.S. §920, page 650, it states:

> "The identification should be reasonably clear and equovocal; and the identity of the accused as the person who committed the

crime must be established
beyond a reasonable doubt..."

In the instant case, the state has failed to meet its burden and never attempted to do so. The testimony throughout trial made references to "Manuel Reyes" and the "defendant", but at no time did any of the state's witnesses indicate which person was "Manuel Reyes" or the "defendant" or the accused party. Petitioner respectfully submits that it cannot be assumed that the state's witnesses are referring to the gentleman sitting at defense counsel's table.

The courts have long held that even in the case of eyewitness identification, the Court should look upon this with caution and precaution. State v. Warren 230 Kan. 385, 389, 653 P2d 1236 (1981). Further, that the

testimony of a mere child as to the identity of the assailant, because of the inherent possibility of error, must be open to the closest scrutiny. Commonwealth vs. McKinley, 123 A2d 735, 181 Pa. S.Ct. 610, and Commonwealth v. Kettering, 119 A2d 580, 180 Pa. S.Ct. 247. In the case at hand, the only witnesses to the crime are two (2) children, neither of which testified at trial, notwithstanding the fact they were qualified to do so. Further, not one of the state witnesses indicated that the Petitioner was the assailant in any manner, nor was an attempt made by the state to prove identity circumstantially by identifying the accused as the person who rented trailer 32 or as the person who purchased the prescription drugs found at the scene. At no time has the state moved to re-open its case for the purpose of identifying

the accused as the perpetrator.

Petitioner respectfully submits that he has not been allowed to face his accusor(s) as no one has attempted to identify him. Counsel was not afforded the opportunity to cross-examine witnesses regarding the identification of the petitioner as there was no evidence presented on direct examination relative to identification, whether direct, circumstantial or otherwise.

The lower court's decision to deny the defendant's motion for acquittal violates the Sixth Amendment confrontation clause and the Fifth and Fourteenth Amendments due process clauses by failing to require the prosecution to directly identify the defendant or to affirmatively identify the defendant by way of circumstantial evidence.

The Kansas Supreme Court has failed to

give adequate consideration to the drastic curtailment of the right to confrontation and due process resulting from the lower court's decision. Thus, consideration of this matter by this court is essential, both for the preservation of petitioner Manuel Reyes' right to a fair trial and for guidance to the courts of other states who may confront this question.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Kansas Supreme Court.

APPENDIX "A"

IN THE SUPREME COURT OF

THE STATE OF KANSAS

State of Kansas, Appellee	)	
	)	
v.	)	No. 87-61589-A
	)	
Manuel Reyes, Appellant	)	
	)	
	)	

You are hereby notified of the following action taken in the above entitled case:

Petition for review.

Denied.

Date: January 31, 1989

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

APPENDIX "B"

NOT DESIGNATED FOR PUBLICATION

No. 61,589

IN THE COURT OF APPEALS OF
THE STATE OF KANSAS

STATE OF KANSAS,
Appellee.

v.

MANUEL REYES,
Appellant.

MEMORANDUM OPINION

Appeal from Barton Court; WILLIAM J. LAUGHLIN, Judge. Opinion filed November 18, 1988. Affirmed.

Jane M. Isern, of Brown & Isern, of Great Bend, for the appellant.

Gene Porter, county attorney, and

Robert T. Stephen, Attorney General, for the appellee.

Before ABBOTT, C.J., LARSON, J., and STEVEN P. FLOOD, District Judge, assigned.

Per Curiam: This is a direct appeal by the defendant Manuel Reyes from his convictio of two counts of taking indecent liberties with a child (K.S.A. 1987 Supp. 21-3503).

The facts are known to the parties and will not be repeated except as necessary in discerning the issues.

1. K.S.A. 1987 Supp. 21-3525

This Court is In re Nichols, 2 Kan. App.

2d 431, 434, 580 P.2d 1370, rev. denied 225 Kan. 844 (1978), stated the rape shield statute allows evidence of an alleged rape victim's prior sexual conduct if it is proved to be relevant to the issues, such as the identity of the rapist, the consent of the victim, and whether the defendant actually had intercourse with the victim. Decisions regarding the relevancy of any evidence, whether made under 21-3525 or otherwise, rest within the sound discretion of the trial court and will not be set aside absent a showing of abuse of discretion. 2Kan. App. 2d at 433. Discretion is abused only when no reasonable person would take the position adopted by the trial court. State vs. Zuniga, 237 Kan. 788, 703 P.2d 805 (1985).

Reyes filed his motion pursuant to K.S.A. 1987 Supp. 2103525, submitting that

two adult male witnesses would testify the complaining witnesses in the present case had attempted to solicit sex from them shortly before the current crime occurred. Reyes argued this testimony was relevant not only to the issue of the complaining witnesses' credibility but also to show that someone other than himself could have committed the acts of which he was accused. The trial court ruled the proposed testimony was irrelevant.

In previous cases, the rape shield statute has been strictly applied. In State v. Carmichael, 240 Kan. 149, 727 p.2d 918 (1986), the defense sought to present evidence of the complaining witness' gonorrhea, which would tend to exonerate the defendant since he did not have the venereal disease. The defendant, however, had been

treated for gonorrhea in the jail clinic when personnel learned he might have been exposed. The Supreme Court ruled the evidence was irrelevant since it could not be established the defendant did not have the disease and would only infer the victim had previously engaged in sexual intercourse.

In State v. Bressman, 236 Kan. 296, 689 P.2d 901 (1984), the defense also sought to present evidence of the complaining witness' past history or treatment for gonorrhea. Because the complaining witness told the defendant she had gonorrhea, but later told police she did not, the defendant wished to impeach the witness' credibility. The Supreme Court held the trial court had not abused its discretion in excluding the evidence because it inferentially involved prior sexual conduct. The court noted that

medical tests taken on the date of the incident showed the complaining witness did not have the venereal disease and she testified she told the defendant she did in an attempt to stop the sexual assault.

In State v. Zuniga, 237 Kan. 788, the defense sought to introduce evidence that, although the complaining witness' husband was incarcerated, she was pregnant at the time of the alleged rape. The defendant claimed that evidence of the pregnancy provided a motive for the complaining witness to fabricate the rape story. The Supreme Court ruled the evidence was irrelevant to a consent defense.

In the case of a nine or ten year old victim of indecent liberties, such as the present case, consent is not at issue. Consequently, whether or not the child victims solicited or agreed to an act of intercourse is irrelevant. Furthermore,

evidence of a prior solicitation would not be relevant to the issue of the victims' credibility or the issue of whether this defendant performed the act of which he is presently accused. The rape shield statute is designed to restrict or prohibit the use of evidence regarding the chastity of the victim. State v. Carmichael, 240 Kan. at 154. The trial court did not err in refusing to allow the defendant to introduce evidence that the victims had allegedly solicited sex from others on previous occasions.

2. Motion for Judgment of Acquittal

At the end of the State's case, the defense moved for judgment of acquittal based on the State's failure to identify Reyes as the defendant in the case. The

trial court denied the defense motion. The court found there was circumstantial evidence that would lead to identification.

> ""A trial judge in passing upon a motion for judgment of acquittal must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes guilt beyond a reasonable doubt is a fairly possible result, he must deny the motion and let the jury decide the matter. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion.""

State v. Lawton, 241 Kan. 140, 143, 734 P. 2d 1138 (1987)

Defendant argues there was no in-court identification of the defendant, nor was evidence presented of an out-of-court identification. The child victims did not testify. The police officer who interviewed the victims testified they did not know the name of their assailant, but told him it was

the man who lived in trailer 32. The officer also stated he believed the girls gave a brief description of their assailant to him, but he did not testify further regarding the description.

The social worker who interviewed the girls also testified they did not know the name of the man who assaulted them, but knew it was the man who lived in trailer 32. During the interviews with the social worker, the girls were asked to choose from a selection of anatomically correct drawings of male and female figures to represent both themselves and their assailant. D.B. picked a drawing of a black adult male to depict the person who assaulted her. T.S. picked a drawing of a white adult male to depict the person who assaulted her. The social worker testified that because the alleged suspect was Hispanic and there were no Hispanic representations

the girls' choices were acceptable. The KBI report also referred to the fact that hair with "mongoloid" characteristics could have originated from Reyes.

Police found a rental agreement and prescription medicine in trailer #32 in the name of "Manuel Reyes." Edmond Johnson testified he had worked with Manuel Reyes on a pipeline in Oklahoma, and Reyes appeared at his home in Oklahoma on September 3, 1986. Johnson testified Reyes told him he (Johnson) could stay at trailer #32 because Reyes had paid the rent for "another couple of weeks."

The State cites State v. Hanks, 236 Kan. 524, 694 P.2d 407 (1985), for the proposition that a conviction of even the gravest offense may be sustained by circumstantial evidence. The State argues that identification can also be proved by

circumstantial evidence. It appears from the evidence cited above that there is substantial competent evidence to support a finding that a man living in trailer #32 whose name is "Manuel Reyes" took indecent liberties with T.S. and D.B. The question before us, therefore, is whether it is necessary to identify someone in the courtroom--presumably the defendant--as the man who was living in trailer #32 named "Manuel Reyes" as the person who committed the offenses.

The State argues that after arraignment, at which the defendant admitted his name was Manuel Reyes, the defendant's name was no longer at issue. The State seems to argue that the defendant waives any claim of error due to absense of identification because defense counsel referred to his client as "Mr. Reyes." In other words, because there

was sufficient evidence to support a conviction of a "Manuel Reyes" who lived in trailer #32, and the defendant admitted his name was Manuel Reyes at arraignment, and defense counsel referred to his client as "the defendant" or "Mr. Reyes" during trial, there is sufficient circumstantial evidence to support the conviction.

The State cites State v. Seitzinger, 180 Mont. 136, 589 P.2d 655 (1979), in which the Montana Supreme Court held identification of defendant by his surname was sufficient where there was no danger of mistaken identification. In Seitzinger, the only specific reference to the defendant as the accused during the State's case in chief was by a police officer who identified him as "Mr. Seitzinger." The court noted:

> "Defendant contends that court erred in refusing to dismiss for the State's failure to sufficiently identify him. No authority is cited. He merely asserts that "normally"

> witnesses identify a defendant by pointing at him in open court as the person referred to. There is no statutory requirement that defendant be formally identified in this fashion. No danger of mistaken identity appears in the context of this case. While the ritual of pointing at defendant and announcing for the record to whom the witness points may add more than drama to a criminal trial, it is not a requisite element of the State's case and the District Court did not err in refusing to dismiss on defendant's motion." 180 Mont. at 140.

As the defendant notes in his brief, Seitzinger testified in his own defense; consequently, there was no doubt as to his identity. The defendant did not testify in the present case. To establish a charge of indecent liberties with a child, the State must prove that the defendant had sexual intercourse with the girls. See PIK Crim. 2d 57.05

We are satisfied from a reading of the

record that the defendant was sufficiently identified for double jeopardy to attach. Defendant's counsel during cross-examination repeatedly referred to the defendant, Manuel Reyes, as the person to whom the victims were referring. When the entire record is examined, there is no possibility the defendant is not the Manuel Reyes who, occupied the trailer located in Lot #32 and is the man who attacked the victims.

Affirmed.

AMENDMENTS TO THE U. S. CONSTITUTION

Amendment 5. — CRIMINAL PROSECUTIONS; DUE PROCESS OF LAW; EMINENT DOMAIN

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6.—FURTHER GUARANTIES IN CRIMINAL CASES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14.—RIGHTS AND IMMUNITIES OF CITIZENS

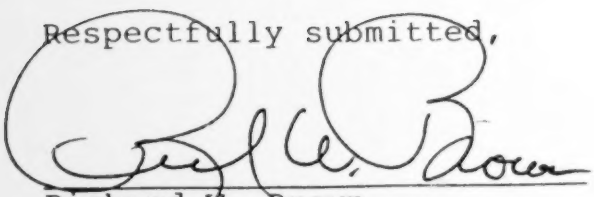
§ 1. Citizenship; privileges or immunities; due process clause. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF KANSAS

BILL OF RIGHTS; TRIAL; DEFENSE OF ACCUSED

§ 10. Trial; defense of accused. In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of the witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense.

Respectfully submitted,



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No. 89-_____

IN THE SUPREME COURT OF THE UNITED STATES
Spring Term 1989

MANUEL REYES, PETITIONER

v.

STATE OF KANSAS, RESPONDENT

AFFIDAVIT OF MAILING

I Richard W. Brown, a member of the Bar of this Court, hereby certifies that the foregoing petition for a Writ of Certiorari was placed in the United States mail by bieng handed to a postal clerk,

first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States at Great Bend, Kansas, on this 17th day of May, 1989, at 1:00 o'clock p.m. C.D.T.

Gregg A. Brown

SUBSCRIBED AND SWORN TO BEFORE me this 9th day of May, 1989.

Jo A. Dewell
NOTARY PUBLIC

My Appointment Expires:

NOTARY PUBLIC - State of Kansas
JO A. DEWELL
My Appt. Exp. 4-17-92

CERTIFICATE OF SERVICE

I do hereby certify that copies of the foregoing Petition for a Writ of Certiorari, Appendices, and Affidavit of Mailing, were placed in the United States mail, postage prepaid, addressed to Robert Stephan, Attorney General for the State of Kansas, Kansas Judicial Center, 301 West 10th Street, Topeka, Kansas 66612, and to County Attorney, Barton County Courthouse, 1400 Main Street, Great Bend, Kansas 67530, on this 17th day of May, 1989.